

BEFORE THE
Federal Communications Commission **RECEIVED**
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Applications for Consent to the
Transfer of Control of Licenses
and Section 214 Authorizations from

AMERITECH CORPORATION,
Transferor

to

SBC COMMUNICATIONS, INC.,
Transferee

CC Docket No. 98-141

**JOINT COMMENTS OF WINSTAR COMMUNICATIONS, INC.
AND TELIGENT, INC.**

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**JOINT COMMENTS OF WINSTAR COMMUNICATIONS, INC.
AND TELIGENT, INC.**

WinStar Communications, Inc. ("WinStar") and Teligent, Inc. ("Teligent") hereby submit their Joint Comments in the above-captioned proceeding.¹

I. INTRODUCTION

When initially proposing the concept of attaching conditions to the approval of a merger between SBC and Ameritech, Chairman Kennard asked the companies to demonstrate how the merger would improve overall consumer welfare and encourage competition in all telecommunications markets.² If residential and commercial

¹ Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications Inc., Transferee, CC Docket No. 98-141, *Public Notice*, DA 99-1305 (rel. July 1, 1999).

² Letter from William E. Kennard, Chairman, Federal Communications Commission to Richard C. Notebaert, Chairman

consumers in multi-tenant buildings are to enjoy the innovation and lower prices associated with competitive facilities-based options in telecommunications services, competitive facilities-based providers must have access to intra-building wiring. Thus, SBC/Ameritech elected to address this issue in response to Chairman Kennard's challenge.

At almost the same time, the Commission issued a Notice of Proposed Rulemaking regarding the promotion of competitive networks in local telecommunications markets reflecting the Commission's understanding of the importance of building access issues facing CLECs now. This is especially true in light of the fact that the Commission acknowledged in the NPRM that "the prospects for facilities-based competition in the near term are especially great from providers that can avoid the need to duplicate the incumbent LECs' costly wireline networks . . . by using wireless technology."³

Competitive providers most in need of access to intra-building wiring are those that least depend on the ILEC for other components of their networks, i.e., those that do not rely on the current list of UNEs, UNE-Ps, or resale. As the Commission has

and CEO, Ameritech Corporation and Edward E. Whitacre, Jr., Chairman and CEO, SBC Communications Inc., dated April 1, 1999.

³ Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, FCC 99-141 at ¶ 5 (rel. July 7, 1999) ("Competitive Networks NPRM").

noted on numerous occasions, meaningful, sustained competition to the ILECs depends on the availability of facilities-based competitive service offerings and the ability of all end users to obtain these services. Without access to intra-building wiring, tenants in MTEs will not have such services available to them.

Any conditions imposed upon SBC and Ameritech should be consistent with the Commission's efforts in the Competitive Networks NPRM. As the Commission stated therein, competition must benefit all consumers, including businesses and residents, regardless of whether they own or rent property.⁴ Therefore, should the Commission consider conditions that bear on the necessary steps to promote competition in the SBC/Ameritech region in connection with the proposed merger, it ought to ensure that those conditions significantly enhance the ability of competitors to access intra-building wiring in multi-tenant buildings.

Teligent and WinStar have described at length to the Commission the need for a single point of demarcation at a multi-tenant building's minimum point of entry ("MPOE") and the need to facilitate the ability of CLECs to access and use existing intra-building wiring for providing competitive telecommunications services.⁵ The SBC/Ameritech proposals with regard to intra-

⁴ Id. at ¶ 6.

⁵ See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Comments of Teligent* (filed Sept. 26, 1997); *Comments of WinStar* (filed Sept. 26, 1997); *Reply Comments of Teligent* (filed Oct. 21, 1997); *Reply Comments*

building wiring, i.e., their so-called "access to cabling" section, fail to accomplish the Commission's goals, as expressed by Chairman Kennard, in attaching meaningful, pro-competitive conditions to an approval of the pending merger.⁶ By no means can the SBC/Ameritech proposals for access to MTE intra-building wiring be relied upon as a serious attempt to eliminate or reduce any barrier to facilities-based competition. In fact, the proposals amount to little more than a commitment to comply with existing regulatory obligations in one commercial building in one city in all of the SBC/Ameritech region. If the Commission, after its investigation is complete, believes the merger requires conditional approval to meet the public interest, then the conditions should be real, not illusory.

II. ANY CONDITIONS RELATING TO INTRA-BUILDING WIRING ADOPTED BY THE COMMISSION SHOULD REQUIRE IMMEDIATE AND MEANINGFUL ACCESS.

SBC and Ameritech propose to institute trials after the merger closing date which will provide CLECs with access at a single point of interface to the cabling in five MDUs and one MTU that SBC/Ameritech controls in its region.⁷ SBC/Ameritech

of WinStar (filed Oct. 21, 1997); Petition for Reconsideration of Teligent (filed April 13, 1998); Comments of WinStar communications, Inc. Supporting and Opposing Petitions for Reconsideration (filed May 12, 1998); Reply to Oppositions to the Petition for Reconsideration and Clarification of Teligent (filed May 22, 1998); see also Commission Actions Critical to the Promotion of Efficient Local Exchange Competition, CCBPol 97-9, Comments of Teligent (filed Aug. 11, 1997); Recommendations of WinStar Communications, Inc. (filed Aug. 11, 1997).

⁶ See SBC/Ameritech Proposed Conditions, Section XVIII.

⁷ See id. at ¶ 57.

propose to delay even beginning these severely limited trials until six months after the merger closing date and will not fully deploy the trials until an entire year after the closing date. The trials will only last one year.⁸ In addition, SBC/Ameritech proposes a three year commitment when it is hired to wire newly constructed or retrofitted "single-building MDUs or . . . multi-tenant business premises," in a manner that will permit CLECs a single point of interface, unless a property owner objects.⁹ The parties also commit to providing a single point of interface for CLECs in newly constructed and retrofitted buildings, where they own or control the cables, for a three year period.¹⁰

As explained in further detail below, many of the proposed conditions are already requirements with which SBC/Ameritech must comply. For those conditions not already required of SBC/Ameritech, the implementation of such conditions by other BOCs suggests that the conditions are readily and technically feasible. If the Commission finds intra-building wiring access conditions to be in the public interest, then SBC/Ameritech's plan to delay implementation of these conditions until a year after the merger would not be acceptable.

The more appropriate approach would require SBC/Ameritech to locate the demarcation point for all multi-tenant buildings in which it maintains a presence at the MPOE and to permit CLEC

⁸ See id.

⁹ SBC/Ameritech Proposed Conditions at ¶ 58.

¹⁰ Id.

interfaces at that point. To be effective, such a condition should be required prior to approval of the merger for the entire SBC/Ameritech region, and it should not be subject to sunset provisions. The immediate compliance requirement would give the parties the necessary incentive to cooperate with interested CLECs and to quickly institute these new procedures so that they can proceed with the merger. Indeed, this is particularly important given SBC's poor record in satisfying post-merger conditions in other transactions.¹¹

III. MANY OF THE ACCESS CONDITIONS PROPOSED BY SBC/AMERITECH ARE ALREADY REQUIRED.

Some of the intra-building wiring conditions proposed by SBC/Ameritech are already required by State or federal law. The proposal to limit implementation of these existing requirements to a limited trial may actually worsen the competitive environment and give the impression that SBC/Ameritech may arguably be relieved from requirements they currently have.

For example, the provision of access to intra-building conduit and rights-of-way is already required by the Act. Teligent and WinStar have consistently maintained that Section 224 requires utilities -- including incumbent LECs such as SBC and Ameritech -- to provide access to cabling that they own or

¹¹ See SBC Communications, Inc., Order, FCC 99-153 (rel. June 28, 1999) (The Commission entered into a Consent Decree with SBC and terminated an informal investigation into potential violations by SBC of Sections 271 and 272 of the Communications Act, as well as possibly inaccurate statements made to the Commission by SBC employees regarding the SBC/SNET merger.).

control within multi-tenant buildings. An ILEC's intra-building wiring and the space that the ILEC equipment occupies represent utility conduit and rights-of-way to which Section 224 grants telecommunications carrier access.

The Commission's recently released Competitive Networks NPRM tentatively concludes that Teligent's and WinStar's interpretation of the Act is correct. The Commission notes that "the inclusion within Section 224 of rights-of-way that a utility 'controls,' as well as 'owns,' suggests that rights-of-way over private property owned by a third party were intended to be included."¹² It goes on to "tentatively conclude that the obligations of utilities under section 224 encompass in-building conduit, such as riser conduit, that may be owned or controlled by a utility."¹³ If the Commission adopts its tentative conclusion, the intra-building wiring conditions proposed by SBC/Ameritech will amount to the same requirement with which all utilities must comply.

SBC/Ameritech also propose "to negotiate, upon a CLEC's request, regarding access to those buildings used in a trial after the conclusion of that trial."¹⁴ Limiting the negotiations to those buildings used in a trial would result in RBOC cooperation in achieving access to just one commercial building for CLECs in the entire SBC/Ameritech region. Hence, such a

¹² Competitive Networks NPRM at ¶ 41.

¹³ Id. at ¶ 44.

¹⁴ SBC/Ameritech Proposed Conditions at ¶ 57(f).

condition does not advance the goal of promoting local exchange competition.

Moreover, some States already provide for CLEC access to multi-tenant buildings. For example, in Texas, nondiscriminatory telecommunications carrier access to multi-tenant buildings is already required statewide.¹⁵ The California Public Utilities Commission required Pacific Bell to establish the demarcation point in multi-tenant buildings at the MPOE and to convey ownership of intra-building wiring to the building owner.¹⁶ Hence, the condition requiring SBC/Ameritech to negotiate with CLECs for access to multi-tenant buildings is illusory in Texas and California.

IV. THE INTRA-BUILDING WIRING CONDITIONS PROPOSED BY SBC/AMERITECH ARE MEANINGLESS.

Access to intra-building wiring is critical for the facilities-based delivery of competitive telecommunications options to consumers in multi-tenant buildings. The SBC/Ameritech proposals pay lip service to this crucial component of facilities-based interconnection and the details and schedule

¹⁵ See Texas Public Utility Regulatory Act §§ 54.259 and 54.260, implemented by Texas Public Utility Commission Project No. 18000.

¹⁶ Moreover, Pacific Bell is already required to make available to competitors vacant space in existing entrance facilities, such as conduit, into commercial buildings up to the MPOE. The California PUC determined that this would allow CLECs "to gain access to building cellars, telephone closets, and network interconnection devices in such buildings." Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, R.95-04-043; I.95-04-044, *Decision 98-10-058*, slip op. at 99 (Cal. PUC, Oct. 22, 1998).

for implementation reveal an almost cynical disregard for the pro-competitive goals of the Commission. In short, the intra-building wiring proposals of SBC/Ameritech are woefully inadequate and meaningless.

There exists no legitimate basis for SBC/Ameritech's trepidation in implementing a single point of interface ("SPOI") within multi-tenant buildings. The concept is hardly revolutionary. Indeed, within SBC's own region, it currently is required to maintain the functional equivalent -- it must locate the demarcation point at the MPOE in all multi-tenant buildings in California.¹⁷ Moreover, other BOCs are required to do the same. The Minnesota Public Utilities Commission also requires location of the demarcation point at the MPOE.¹⁸ The Nebraska Public Service Commission recently required U S WEST to provide, upon request, the ability for a CLEC to interconnect with intra-building wiring at the MPOE of a building and to use such wiring to serve tenants.¹⁹ And, of course, the Commission's own rules

¹⁷ See Pacific Bell, Applications 85-01-0034, 87-01-002, *Decision* 92-01-023, 43 CPUC 2d 115 (Cal. PUC, rel. Jan. 10, 1992).

¹⁸ In the Matter of the Deregulation of the Installation and Maintenance of Inside Wiring based on the Second Report and Order in FCC Docket 79-105 Released February 24, 1986, Docket Nos. P-999/CI-86-747 and P-421/C-86-743, *Order*, 1986 Minn. PUC LEXIS at *9-10 (Minn. PUC, Dec. 31, 1986).

¹⁹ See In the Matter of the Commission, on its own motion, to determine appropriate policy regarding access to residents of multiple dwelling units (MDUs) in Nebraska by competitive local exchange telecommunications providers, Application No. C-1878/PI-23, *Order Establishing Statewide Policy for MDU Access*, slip op. at 4 (Neb. PSC, entered March 2, 1999).

require SBC and Ameritech both to locate the demarcation point at the MPOE in newer buildings²⁰ and, in older buildings, to relocate the demarcation point (and thereby permit a single point of CLEC interface) at the MPOE at the request of the building owner.²¹ Hence, both SBC and Ameritech must already be prepared to provide an SPOI in multi-tenant buildings (if they are not already doing so). Based on these circumstances, the conditions proposed by SBC/Ameritech are nothing more than promises to do what they already are required to do. There certainly is no reason for a "trial" period.

Moreover, the trial proposed by SBC/Ameritech is unlikely to have any meaningful effect on competitive options for consumers in multi-unit buildings within the SBC/Ameritech region. For example, the trial may be limited to only one commercial multi-tenant building in only one city in the entire expansive region that would be covered by the merged company.²² In addition, a good portion of the commercial multi-tenant environment is

²⁰ See 47 C.F.R. § 68.3(b)(2) (for buildings in which wiring is installed after August 13, 1990, the demarcation point is located at the MPOE).

²¹ See Review of Sections 68.104 and 68.213 of the Commission's Rules concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket No. 88-57, Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking, 12 FCC Rcd 11897 at n.104 (1997) (holding that for buildings in which wiring was installed prior to August 13, 1990, the carrier must move the demarcation point to the MPOE at the request of the building owner).

²² See SBC/Ameritech Proposed Conditions at ¶ 57(c) ("In at least one city, the trial shall include at least one MTU.").

entirely ignored by the proposed trial. SBC/Ameritech defines an MTU as a "multi-tenant premises housing small businesses."²³ As proposed, the trial -- limited to residential buildings and "MTUs" -- would exclude buildings that contain only medium-sized and large commercial tenants. There is no basis (other than the fear of losing medium to large-sized business customers to competitors) for not including in the trial buildings containing medium and large-sized businesses.

Finally, SBC/Ameritech offers to install wiring in newly constructed or retrofitted buildings to provide for an SPOI for a period of three years after the Merger Closing Date.²⁴ As noted above, the carriers are already required to implement this approach.²⁵ Even if the Commission's rules did not require an SPOI, there would be no reason -- other than anti-competitive incentives -- to cease the practice after three years. This is particularly true in light of the fact that even more facilities-based carriers likely will be active in the market in three years and dependent upon access to an SPOI for efficient competitive delivery of services to end users.

The intra-building wiring conditions proposed by SBC/Ameritech amount to promises to comply with existing regulations or to implement trials that will have little or no effect on the competitive landscape within the SBC/Ameritech

²³ Id. at ¶ 57.

²⁴ Id. at ¶ 58.

²⁵ 47 C.F.R. § 68.3(b)(2).

region. Consequently, they will not further the pro-competitive goals of the Commission.

V. THE VAGUENESS OF THE PROPOSALS COULD LEAD TO ANTICOMPETITIVE IMPLEMENTATION.

The vague language of the proposed conditions could result in anticompetitive implementation by SBC/Ameritech. In particular, the general nature of the proposal to give competitors access to cabling in multi-tenant commercial buildings permits various interpretations, which could result in anticompetitive conduct by SBC/Ameritech. For example, the proposed condition specifies only that CLECs will be given "access at a single point of interface to the cabling that SBC/Ameritech controls."²⁶ This language gives SBC/Ameritech the option of locating the SPOI at some point well within a building. Moreover, the proposed condition fails to mention the prices that SBC/Ameritech will charge for use of the intra-building wiring, thereby implicitly permitting SBC/Ameritech to charge excessive and anticompetitive prices for such use. Finally, the "cabling that SBC/Ameritech controls"²⁷ may exclude some facilities and spaces essential to facilities-based competition within a multi-tenant building. Each of these problems directly conflicts with one of the primary goals of the proposed conditions -- to promote competition. If the Commission finds that conditional approval of the merger satisfies the public interest, it should eliminate

²⁶ SBC/Ameritech Proposed Conditions at ¶ 57(d).

²⁷ Id.

the possibility that the conditions could allow the anticompetitive results described below to occur.

The proposed condition does not require SBC/Ameritech to locate the SPOI at the MPOE.²⁸ In fact, the proposed condition fails to specify any location in the intra-building wiring system at which the SPOI should be established. To illustrate the dangers of this omission, consider the ramifications of allowing SBC/Ameritech to locate the SPOI at some point deep within the building -- such as the top floor. If the SPOI is located on the top floor of a building, there may be left a large stretch of intra-building wiring that remains part of the SBC/Ameritech network to which carriers do not have access. As a result, facilities-based competitors would be left with two equally unattractive options -- re-construct that portion of SBC/Ameritech's intra-building network between the MPOE and the SPOI, or pay SBC/Ameritech an as yet unspecified amount for use of the intra-building network.

Neither option promotes competition. In fact, both permit SBC/Ameritech to engage in anticompetitive conduct. First, reconstructing even a portion of the intra-building network could

²⁸ Of course, the anti-competitive effects described in this section would apply to both proposed conditions regarding access to intra-building wiring in multi-tenant buildings if SBC/Ameritech does not locate the SPOI at the MPOE. The FCC's rules define the minimum point of entry as "either the closed practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings. The telephone company's reasonable and nondiscriminatory standard operating practices shall determine which shall apply." 47 C.F.R. § 68.3.

cost facilities-based competitors thousands of dollars per building and further delay implementation of competitive service to that building. Consequently, while facilities-based competitors would be spending valuable time and money reinstalling wiring on every floor below the SBC/Ameritech chosen SPOI, SBC/Ameritech would be able to continue to provide service over the existing wiring and claim that they had provided "access" to the cabling that SBC/Ameritech controls. SBC/Ameritech would thereby appear to fulfill its obligation under the proposed condition, but in reality create an anticompetitive environment for facilities-based competitors.

Second, competitors may be able to pay SBC/Ameritech for use of the intra-building wiring to which they would not have access if the SPOI is located well within the building. This option, at first glance, appears feasible. The proposed condition, however, fails to specify or even mention the prices that SBC/Ameritech may charge competitors for use of the intra-building wiring. The proposed condition addresses only administrative costs and costs incurred as part of recabling and reconfiguration efforts. As a result, the failure to set pricing standards creates another opportunity for SBC/Ameritech to engage in anticompetitive conduct. Under the proposed condition, SBC/Ameritech could set prices for use of its intra-building wiring at excessive amounts, effectively prohibiting potential competitors from using inaccessible intra-building wiring and offering competitive service. Moreover, this scenario would require CLECs to first negotiate with a multi-tenant building owner for access to the

building and then to negotiate separately with the ILEC, the CLEC's chief competitor, for access to certain facilities within the building. An increase in the parties with whom a CLEC must negotiate for access increases the likelihood that one part of the negotiations will be unsuccessful or protracted (thereby preventing access to the consumers within the building in a timely manner). The process of obtaining access to intra-building wiring need not be so complex, expensive, and time-consuming.

Finally, the cabling "controlled" by SBC/Ameritech to which the trial applies may exclude some facilities and spaces essential to facilities-based competition within a multi-tenant building, such as equipment rooms and cross-connect devices. Once again, the vague language of the proposed condition would permit SBC/Ameritech to comply facially with the condition while simultaneously acting to anticompetitively affect its competitors. If the proposed condition is adopted, SBC/Ameritech could decide to grant CLECs access to an SPOI, but require CLECs to pay for access to all other spaces and facilities within the building (or deny access entirely) and charge prohibitively high prices for such access. Facilities-based competitors would thereby incur additional costs and waste valuable time, creating anticompetitive results similar to those that would be produced if a competitor were forced to reconstruct the intra-building wiring.

As drafted, the proposed condition leaves open several possible avenues that could lead to anticompetitive

implementation. Any conditions ultimately adopted by the Commission should provide clear and unambiguous requirements that SBC/Ameritech must follow. If conditional approval of this merger is truly going to promote competition, the conditions adopted cannot allow for the development of loopholes that would permit SBC/Ameritech to engage in anticompetitive conduct. Accordingly, facilities-based competitors participating in the trials proposed by SBC/Ameritech must be assured access to an SPOI located at the MPOE, and use of other facilities and spaces within the building at reasonable, competitive prices.

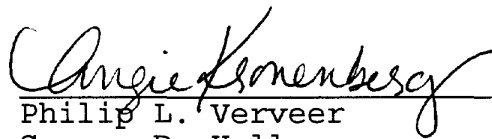
VI. CONCLUSION

The proposals submitted by SBC/Ameritech are inadequate to achieve the Commission's stated goals. For the foregoing reasons, WinStar and Teligent respectfully urge the Commission to ensure that any intra-building wiring conditions that are ultimately adopted are meaningful and effective in achieving the Commission's goals. To that end, the proposed conditions should be revised to require SBC/Ameritech to locate the demarcation point at the MPOE in all multi-tenant buildings in the SBC/Ameritech region and to permit CLEC interface with intra-building wiring at that point prior to approval of the merger.

Respectfully submitted,

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Dated: July 19, 1999

CERTIFICATE OF SERVICE

I, Rosalyn Bethke, do hereby certify that on this 19th day of July 1999, copies of the attached Joint Comments of Teligent, Inc. and Winstar Communications, Inc. filed today with the FCC in CC Docket No. 98-141 were served by first class mail, postage prepaid, or hand delivered as indicated, on the following parties:

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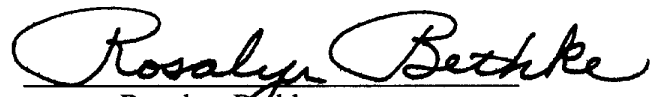
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